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No. 88-1371

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

KEITH E. ELLIS, LINDA ELLIS, DENNIS HODNETT, SANDRA W. HODNETT and THOMAS L. CURRY
Petitioners

v.

CONSOLIDATED DIESEL ELECTRIC CORPORATION and CONDEC CORPORATION
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

Respondents do not choose to attempt to reframe the Questions Presented as drafted by Petitioners.

LIST OF PARTIES

The caption of the case contains the names of all parties in the Court except LTV Corporation and Vought Corporation who were named as Defendants in the Trial Court. A separate appeal involving those two Defendants is currently pending in the United States Court of Appeals for the Tenth Circuit.

CORPORATE AFFILIATIONS

Pursuant to the Supreme Court Rules, Rule 28.1, the Respondents being corporations inform the Court that from 1968, when the production contract for the vehicle in question was awarded, Consolidated Diesel Electric Corporation was a wholly owned subsidiary of Condec Corporation. From that point in time to the present date, the following corporations have been parent companies or subsidiaries or affiliates of each of the two named corporations:

Condec Corporation, New York
Condec Corporation, Delaware
Farley Acquisition Corporation
VBQ Holding, Inc.
CATEP, a Societe Anonyme organized under the laws of France

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Reasons for Denying the Writ:

I. Respondents believe that the Petitioners' statement as to why this Court should grant the writ contains a number of inaccuracies or omissions. Therefore, Respondents submit that this Court should deny the writ for the following reasons.

This Court held in *Boyle vs. United Technologies,* 108 S.Ct. 2510 (1988) that the procurement of equipment by the United States is an area of uniquely federal interest and any State law in "significant conflict" between an identifiable federal policy or interest will be displaced. This Court further found that a "significant conflict" between federal interests and State law in the context of government procurement exists whenever the armed forces exercise a discretionary function as defined under the Federal Tort Claims Act found at 28 U.S.C. Section 1346(b). Therefore, as this Court stated in *Boyle,* State law will be displaced in regard to liability for design defects in military equipment if (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the

supplier warned the United States about the dangers in the use of the equipment of which the supplier had greater knowledge than the United States. The Petitioners agree that parts one and two of this test have been met by Respondents. The only question extant pertains to point number three, "the duty to warn".

Petitioners urge this Court to grant a writ of certiorari on the grounds that the Trial Court and the Court of Appeals have misapplied this Court's decision in Boyle. They contend that the lower Courts erred in finding that Petitioners had failed to present competent evidence adequate to raise a material issue of fact regarding Respondents' compliance with the "duty to warn" requirement. Specifically, they urge that the lower Courts erred when they found that the United States had vast engineering experience in ground vehicle design and was, therefore, in a position at least equal to that of Respondents (who had not participated in the design of the vehicle in question) to recognize the potential danger created by placing the vehicle's batteries atop the fuel tanks.

Respondents submit that this issue does not warrant review by this Court. Both lower Courts properly examined the record presented by Petitioners, utilizing the legal criteria announced by this Court in Boyle and other consistent appellate court decisions, as well as the well established standards in deciding motions for summary judgment. Thus, for all of Petitioners' efforts to elevate the issue in this case to a level that would satisfy Supreme

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Court Rule 17, this case remains an ordinary summary judgment case, in which the Petitioners failed to present sufficient and/or competent evidence to raise questions of material fact, which are necessary to defeat an adverse party's motion for summary judgment. This case does not, and cannot, affect in any manner the scope of the government contractor's immunity defense which this Court has recently considered. 3

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IN THE

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v.

CONSOLIDATED DIESEL ELECTRIC CORPORATION and CONDEC CORPORATION
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Respondents object to the Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, and request this Court to deny the Petition herein.

STATEMENT OF THE CASE

Respondents feel it necessary to correct, in as concise a manner as possible, the inaccuracies contained in the Petitioners' Statement of the Case. As stated in Petitioners' Statement, this was a one vehicle accident. However, the facts of the

accident reveal that this vehicle left the roadway and impacted with two separate concrete culverts while the vehicle was going approximately 60 miles per hour. These impacts completely tore the left front wheel out of the supporting framework and drive line, causing that heavy steel wheel to be carried back alongside the hull of the vehicle, where it sheared off the left side fuel tank. That fuel tank had been punctured by contact with one of the culverts, and it was also distorted so as to reduce its interior capacity and the fuel lines connected to it were torn loose. These factors caused fuel to spew from the tank. One scenario is that the battery cables arced when the battery cables were torn loose, and that the electrical arc or arcs ignited diesel fuel from the fuel tank, causing the fire. There was evidence in this case of another source of ignition for the fire, but for purposes of the instant Petition, there is no need to go into that aspect of the case.

The Petitioners claim to have presented competent, uncontroverted testimony that the Gama Goat vehicle was unreasonably dangerous. The only alleged defect, however, was that the vehicle's batteries were placed directly above the fuel tanks. The uncontroverted evidence was that the batteries were so placed at the express insistence of the military because the contemplated use of the vehicle required the placement of the batteries in that location in order to facilitate battery maintenance in the temperature extremes of an arctic environment which required a "battery heater kit" to be installed. (Order of Trial Court, pp. 7b, 8b and 13b, Appendix B of Petition for Writ of Certiorari)

Respondents presented testimony that the supposed defect was not a defect at all, and that the Petitioners' evidence in this regard was incompetent, but the defect was never the issue upon which summary judgment was granted. Rather, Respondents contended that even if a defect were assumed, the claimed

defect was obvious, and therefore, the military had at least as much information concerning the supposed defect, as did the Respondents.

On this issue, the Respondents did not present their own expert testimony, because the Petitioners' experts specifically testified that the placement of the batteries on the fuel tanks was so inherently and patently dangerous, that anyone with an engineering degree would have recognized the defect. (Lehman Deposition, pp. 205, 206) The Petitioners struggled to mitigate their experts' admissions by claiming that the Army command responsible for developing the vehicle, the Tank and Automotive Command ("TACOM"), was not competent to recognize this supposedly patent defect. Again, however, Petitioners' own expert acknowledged that TACOM most certainly did employ hundreds of vehicle design engineers who should have recognized this defect, and must, therefore, share the "blame" for allowing the battery placement. (Lehman Deposition, pp. 162, 165, 206) Furthermore, both lower courts concluded that the Petitioners' self-styled "expert testimony" on this issue was incompetent because the designated experts had never worked with TACOM, and, in fact, had never designed or worked on the design of a ground military vehicle. (Order of Trial Court, pp. 7b, 8b and 13b, Appendix B of Petition for Writ of Certiorari)

REASONS FOR DENYING THE WRIT

This Court held in *Boyle vs. United Technologies,* 108 S.Ct. 2510 (1988) that the procurement of equipment by the United States is an area of uniquely federal interest and any State law in "significant conflict" between an identifiable federal policy or interest will be displaced. This Court further

found that a "significant conflict" between federal interests and State law in the context of government procurement exists whenever the armed forces exercise a discretionary function as defined under the Federal Tort Claims Act found at 28 U.S.C. Section 1346(b). Therefore, as this Court stated in *Boyle,* State law will be displaced in regard to liability for design defects in military equipment if (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The Petitioners agree that parts one and two of this test have been met by Respondents. The only question extant pertains to point number three, "the duty to warn". The lower courts both held that the Petitioners failed to present any competent evidence to demonstrate a danger in the use of the equipment known to the Respondents, but not known to the government. (Order of Trial Court, p. 12b, Appendix B of Petition for Writ of Certiorari)

This Court did not define its requirements for the "duty to warn", instead leaving the details of the duty to be developed by courts of lower jurisdiction. It is significant to remember that the Trial Court's decision in the instant case was rendered prior to this Court's decision in *Boyle.* However, the Trial Court's decision is in agreement with decisions from other federal circuits that followed the *McKay v. Rockwell International Corp.,* 704 F.2d 444, (9th Cir. 1983), enunciation of the government contractor's immunity. The United States Court of Appeals for the Tenth Circuit adopted the Trial Court's order by stating its agreement with the Trial Court's ruling that the Petitioners had failed to raise a genuine issue of fact precluding summary judgment for Respondents. (Appendix A of Petition for Writ of Certiorari) comment. Thus, the Tenth Circuit is in conformity

with this Court's *Boyle* decision and the majority of other Federal Circuit Courts of Appeal in regard to the duty to warn.

This Court's jurisdiction on a Writ of Certiorari is discretionary. Rule 17 of the Supreme Court Rules set out general guidelines for when this Court will grant a Petition for Certiorari. One of those criteria is when a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter, and thereby created a conflict in the Circuits. As was stated above, there is no conflict among the various Courts of Appeal in regard to the "duty to warn". Neither has the Tenth Circuit sanctioned such a departure from the accepted and usual course of judicial proceedings by the Trial Court so as to call for an exercise of this Court's power of supervision. An examination of the remaining provisions of Rule 17 show that the instant case does not fall within any of the other delineated reasons wherein this Court will grant certiorari, and it is submitted that the instant case does not present any special or important reasons outside the scope of the Rule's guidelines whereby this Court should grant the Petitioners' Writ for Certiorari.

Most importantly, Respondents would submit to this Court that the instant case does not have anything to do with the third prong of the government contractor immunity defense. The Petitioners have styled their Petition in this manner in an attempt to attract this Court's interest, however, a review of the Trial Court's Order reveals that this case actually presents a much more mundane question, involving the propriety of summary judgment. That is why the Petitioners' Brief only cites summary judgment cases, and the true issue which is dispositive of this case, is whether or not Petitioners raised a genuine issue of material fact in their response to the Respondents' Motion for Summary Judgment. The Trial Court ruled that they had

not, and the United States Court of Appeals for the Tenth Circuit affirmed, adopting the Trial Court's Order finding that the Petitioners had failed to raise a genuine issue of material fact by which to preclude summary judgment in favor of Respondents. (Appendix A of Petition for Writ of Certiorari) Thus, the Respondents contend that the issue before this Court in the instant case, is an ordinary, garden variety summary judgment issue, which only coincidentally happens to involve a lawsuit wherein the Respondents have asserted the government contractor's immunity defense.

ARGUMENT, AUTHORITIES AND STATUTES

In the Trial Court, Respondents presented evidence in regard to the duty to warn. That evidence came in part from Petitioners' own expert witness, Ben Lehman, who testified in his deposition, taken by Respondents, that TACOM, the government agency in charge of procuring the military truck in question, did employ persons having various engineering backgrounds, and in Lehman's opinion, TACOM's personnel were competent to recognize the type of defect which has been alleged by the Petitioners, and that TACOM must, therefore, share the "blame", if any, for permitting the alleged design "flaw" to be incorporated into the Gama Goat. (Lehman Deposition at 162, 165 and 206). Further, in his Affidavit, which Petitioners attached to their Trial Court Brief in Opposition to Respondents' Motion for Summary Judgment, Lehman stated that the alleged defect was an "obvious and patent" defect. (Lehman Affidavit, Paragraph 7). Perhaps this is why the Petitioners in their Appeal to the United States Court of Appeals for the Tenth Circuit, sought to ignore Lehman's testimony and Affidavit, and only rely upon their other paid expert witness.

In addition to Lehman's evidence, these Respondents submitted the Affidavit of H. Guy Ritch, who had been employed by Consolidated Diesel Electric Company, since 1967, who testified in his Affidavit that he had been in charge of examining and supervising the repair of approximately fifty of the military trucks in question which had been damaged in various types of accidents, including those where fuel cells had been crushed or bent, vehicles where the battery casing had been broken, and other various and sundry severe damages, and that none of those vehicles observed had been subject to a vehicular fire, fuel tank separation from the hull of the vehicle, or battery separation from the fuel tank. During the oral argument in the Trial Court, the Court questioned Petitioners' counsel if there was any government record of any other fires in these vehicles over the period of time prior to the accident in question. Petitioners' counsel admitted that the record was silent as to any other fires. The Court questioned counsel if the government wasn't a source for that type of information and the government's analysis of these vehicles, and counsel admitted that they had received information from the Army by way of a computer printout of some accidents involving Gama Goats, and that none of the accidents in the printout involved fires that took place in the context of the fire in the instant case. (Excerpt from transcript of proceedings had on January 3, 1986, B-3-B-5, Appendix B) The evidence before the Trial Court was that over 15,000 of these military trucks had been delivered to the Army by 1973, and that the accident involving the Petitioners had occurred in 1984. Over eleven years of continuous use of some 15,000 vehicles amounts to approximately Sixty Million Two Hundred Twenty-five Thousand vehicle days up to the time of the accident, and yet the Petitioners were unable to produce evidence of any other fire.

The inescapable conclusion of this unrefuted evidence, some of which came from Petitioners themselves, clearly established that the Army knew, or was capable of knowing, of any danger associated with the use of this particular equipment. In fact, the Army was in a position to know of any danger in the use of the vehicle, superior to that of the Respondents. Unlike the Respondents which had only manufactured the vehicle, and which had been required to comply with strict government specifications, the Army had actively participated in the design, development and testing of the vehicle, all of which had taken place before Respondents were awarded the production contract, and the Army had had continuous experience with the vehicle over many years' time after the Respondents' manufacturing of the vehicles had ceased. Faced with this evidence, one wonders how the Petitioners can assert to this Court that there was no evidence on the part of the Respondents sufficient to meet the third requirement of the military contractor's defense, i.e. that the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier, but not to the United States.

Prior to this Court's pronouncement in *Boyle v. United Technologies,* 108 S.Ct. 2510 (1988), several Circuit Courts of Appeal had considered TACOM's ability to assess the merits of the design of vehicles which it procured. As stated, TACOM is the principle Army command responsible for the procurement of all United States Army vehicles. At least four United States Courts of Appeals had found before this Court's *Boyle* pronouncement that "the government 'has both the ability to recognize safety problems in military equipment, and to negotiate with the suppliers to remedy those problems.' " *Bynum v. FMC Corporation,* 770 F.2d 556, 572 (5th Cir. 1985) (Quoting *McKay v. Rockwell International Corp.,* 704 F.2d

444, 452 (9th Cir. 1983)). See also, *In Re: Air Crash Disaster at Mannheim, Germany on 9/11/82,* 769 F.2d 115, 123-125 (3rd Cir. 1985); *Tillett v. J.I. Case Company,* 756 F.2d 591, 599 (7th Cir. 1985). In *Bynum* the Court had found that:

> "TACOM has a staff of over 5,500 personnel, both civilian and military, who are engaged in the design and testing of wheeled and tracked vehicles procured for military use. TACOM personnel include power plant engineers, power train engineers, suspension engineers, material engineers (ballistics experts, etc.), welding engineers, quality engineers, packing engineers and other specialists. It is TACOM's reported function to make the military decisions and the engineering and design decisions necessary to insure that the M-548, as well as other military vehicles are able to perform the military missions for which they are conceived."

Bynum v. F.M.C. Corporation, 770 F.2d at 572, n. 20.

The Trial Court had no difficulty in finding that the above cited evidence met, at a minimum, the threshold requirements of the military contractor's defense, as that defense had been enunciated in *McKay,* since in its order it found at page 12b that the placement of the batteries on top of the external fuel tanks was open and obvious, and at page 12b that TACOM was capable of being knowledgeable concerning the potential dangers related to the proximity of the batteries to the fuel cells. (Order of Trial Court, Appendix B of Petition for Writ of Certiorari)

On February 23, 1989, the United States Court of Appeals for the Fifth Circuit handed down an opinion in *Smith v. Xerox Corporation,* _____ F.2d _____ (5th Cir. 1989) (Copy at Appendix A), which was another case involving government contractor immunity. The Fifth Circuit acknowledged this Court's decision in *Boyle,* and noted that the

Fifth Circuit's previous application of the government contractor defense was essentially the same as enunciated in *Boyle*. In this case a man named Lawrence Gallagher, who was an employee of Xerox from 1975 to 1983, and who had been involved with the development of the weapons system in question, testified by deposition. One of the Plaintiff's contentions to the Court was that the Defendant Xerox had not met its burden of proof in regard to the requirement that the supplier warn the United States about dangers in the use of the equipment that were known to the supplier, but not to the United States.

The Court noted that the government had "extended use" of the VIPER weapons system (Appendix A, p. A-8). The Court stated that the record showed that the weapon had misfired and caused injury to Smith, the Plaintiff, and that immediately after Smith's accident, a Colonel tested the weapon in the field, and it again misfired. However, that incident alone, the Court found, had no bearing on Xerox's actual knowledge of the weapon's defective condition prior to Smith's accident (Appendix A, p. A-9). "Gallagher testified that Smith's accident was the first he had heard of the VIPER system's firing when in the armed position. Even if similar accidents had occurred, because the government must receive accident reports, it is difficult to see how it can be said from such incidents that Xerox at any time had information about dangers in the use of the equipment known to the supplier, but not known to the United States." (Appendix A, p. A-9, A-10)

When this Court compares the factual situation of the *Smith* case with the factual situation of the instant case, and the evidence that the Defendants brought before the Trial Court on Summary Judgment, the similarities are obvious. The Army had extensive use of the equipment prior to the accident in question. Army records fail to reveal previous accidents of the kind and

nature involved in the litigation, and the supplier, or Defendant, had no information about any defective condition in the equipment prior to the accident which lead to the litigation. The Fifth Circuit Court found, in Smith, that for the reasons stated the Defendant Xerox had met its burden of proof on the third element of the government contractor immunity. Likewise, the Trial Court in the instant case found that the Defendants had met their burden of proof for all elements of the government contractor immunity defense. Once that burden had been met, the Plaintiff was required to come forward with competent evidence to establish that there is a genuine issue of material fact.

The Petitioners cite to this Court the cases of *Celotex Corp. v. Catrett,* 106 S.Ct. 2548 (1986), and *Anderson v. Liberty Lobby, Inc.,* 106 S.Ct. 2505 (1986), and argue these two cases extensively in their attempt to convince this Court that the Trial Court failed to correctly assess the evidence before it on Defendants' Motion for Summary Judgment. They argue that credibility determinations are not to be considered by the trial judge, and "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Citing *Anderson* at 2513. They overlooked, however, the fact that Federal Rule of Civil Procedure 56(e) has requirements contained within it that were apparently not an issue in *Celotex* or *Anderson* since they were not addressed in the decisions of this Court. Federal Rule of Civil Procedure 56(e) requires that "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . ." Unless the opposing affidavits meet these requirements, they are not competent evidence, and the statement in *Anderson* that the

"evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor" does not apply. Respondents submit that the Trial Court had to rule upon the admissibility of the affidavits submitted by Plaintiffs in support of their Response to Defendants' Motion for Summary Judgment, and could consider them only if those affidavits met the test of Rule 56(e). What the Petitioners do not tell the Court in their Petition, is that the Trial Court found, as a matter of law, that their expert witnesses, Johnson and Lehman, were without knowledge or experience concerning Army procurement and design of ground wheel or track vehicle design, and that the affidavits of those two witnesses were not based upon personal knowledge and did not set forth such facts as would be admissible in evidence, and did not show that the witness was competent to testify to the matters stated in the affidavit. (Order of Trial Court, pp. 9b, 10b, Appendix B of Petition for Writ of Certiorari) Therefore, Petitioners' affidavits were not evidence, as that term is used by this Court in *Anderson,* id. Since they constituted the only purported "proof" submitted by Petitioners, the lower courts correctly held that Petitioners failed to meet their burden of establishing by competent evidence, the existence of a genuine material issue of fact. With the evidence before it, the Trial Court had no need to involve itself in judging credibility of witnesses. Its only possible conclusions were that Respondents' Motion for Summary Judgment met the requirements of Federal Rule of Civil Procedure 56(c), 28 U.S.C.A., and that there was a lack of a genuine triable issue of material fact.

The Petitioners raised the same contentions in the United States Court of Appeals for the Tenth Circuit, i.e. that the Respondents had failed to meet their burden of establishing compliance with the suppliers' duty to warn the government of

any dangers known to it, but not known to the government. The Tenth Circuit had the opportunity to review the record, review the briefs submitted by the parties, to hear the oral argument of the parties, and to pose questions to counsel for the parties. After that careful review, the Tenth Circuit issued a one paragraph Order, in which the Trial Court's Order was affirmed, with the comment that the Tenth Circuit Court of Appeals agreed with the District Court's finding, that the Petitioners had failed to raise a genuine issue of fact.

CONCLUSION

The Respondents have cited to this Court the decisions of four separate United States Courts of Appeals which have concurred in their interpretation of the requirements set down by this Court in *Boyle v. United Technologies,* 108 S.Ct., 2510 (1988), that "(3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier, but not to the United States", thereby evidencing the fact that there does not exist a conflict among the various Federal Courts of Appeal on the same matter. In addition, the Respondents have shown this Court why the United States Court of Appeals for the Tenth Circuit has not sanctioned a departure from the accepted and usual course of judicial proceedings by the Trial Court, so as to call for an exercise of this Court's power of supervision, and that there is no other reason or consideration in the instant case which would meet the test of Rule 17 of the Supreme Court Rules by which this Court should grant certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit. Respondents have further cited to this Court the evidence which has been found competent to satisfy each of the provisions of the government contractor immunity defense as set out by this Court in *Boyle.*

Respondents have also cited to this Court the reasons why the Plaintiffs failed to establish a genuine issue of material fact, which inevitably had to lead to the Trial Court's granting Summary Judgment to these Respondents. The true issue presented here is whether or not the Petitioners brought forth any competent evidence in opposition to Respondents' evidence submitted in support of their Motion for Summary Judgment, an issue which has been competently ruled upon, both by the Trial Court, and by the United States Court of Appeals for the Tenth Circuit and which was decided in favor of Respondents. There is no demonstrated need for this Court to further interpret, at least in the instant case, the standards for government contractor immunity, which it recently announced in the *Boyle* decision. There is no demonstrated reason for this Court to grant Petitioners' Writ for Certiorari, and Respondents respectfully request this Court to deny said Petition.

Respectfully submitted,

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APPENDICES

APPENDIX A

BENNETT P. SMITH,
Plaintiff-Appellant,

v.

XEROX CORPORATION,
Defendant-Appellee

No. 87-3853

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

1989 U.S. App. LEXIS 2033

February 23, 1989

APPEAL-STATEMENT
[*1]

Appeal from the United States District Court for the Eastern District of Louisiana.

COUNSEL:

LEA & GIBBENS, David J. L'Hoste, Rockne L. Moseley

BLUE, WILLIAMS & BUCKLEY, Thomas G. Buck, Metairie, LA

Charles A. Boggs, Thomas W. Lewis, FOR LORAL ELECTRO OPTICAL

OPINION BY: JOLLY

OPINION:

Before JOHNSON, JOLLY and JONES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this case we are called upon to consider whether the district court properly granted summary judgment in favor of Xerox Corporation, in a tort suite against it for personal injuries arising from the malfunctioning and premature discharge of a weapon simulator used during military training exercises, on the grounds that Xerox is entitled to the affirmative defense of government contractor immunity. Holding that Xerox presented evidence supporting its claim to the defense of government contractor immunity, and that Smith failed to raise any genuine issue of material fact regarding the defense, we affirm the summary judgment in favor of Xerox.

I

On November 16, 1983, P.F.C. Bennett Smith, was severely injured during military training exercises at Fort Polk, Louisiana, when an explosive cartridge in a shoulder-mounted "VIPER" weapon simulator he was using [*2] exploded prematurely, burning his arm and upper chest. The VIPER simulator was designed to fire a beam of laser light at light sensitive targets and had an explosive cartridge which simulated the noise, fire and smoke produced by an actual anti-tank weapon. When Smith moved the safety catch on the VIPER into the "arm" position, the VIPER discharged without Smith's having pulled the trigger. Smith was caught in the weapon's back blast.

Smith brought suit for his personal injuries against Xerox, the manufacturer of the weapon, and Loral Electro Optical Systems, Inc., the company under contract with the United

States Army to repair VIPER units. His allegations against Xerox included negligence in the design and/or manufacture of the weapon; strict liability for injuries caused by a weapon unreasonably dangerous for its normal use; the failure to warn or instruct Smith regarding the possibility of weapon's firing when armed, when Xerox had knowldge that the weapon had malfunctioned in a similar manner previously; and breach of warranty of fitness for intended use. Smith also pled the doctrine of res ipsa loquitur on his negligence claims.

On October 16, 1987, Xerox filed a motion [*3] for summary judgment arguing that Smith's claims be dismissed as a matter of law, on the grounds that even if Smith could show a design or manufacturing defect, Xerox was entitled to summary judgment on its assertion of the government contractor's immunity defense. The district court granted the motion, and from that judgment Smith now appeals.

II

The Supreme Court recently settled a division among the circuits as to the proper formulation of the government contractor defense in *Boyle v. United Technologies Corp.*, U.S., 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), holding that "liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." 108 S.Ct. at 2518. *Boyle* further held that the government contractor defense applies to both negligence and strict liability actions, as well as to other state law tort claims.

Although *Boyle* was decided after the district [*4] court considered this case and after the case was initially briefed to this court, we note that this circuit's previous application of the government contractor defense employed essentially the same standard as we now apply under *Boyle.*

Prior to *Boyle,* this circuit in *Bynum v. F.M.C. Corp.,* 770 F.2d 556 (5th Cir.1985) had adopted the Ninth Circuit's formulation of the defense set forth in *McKay v. Rockwell International Corp.,* 704 F.2d 444 (9th Cir.1983). *Boyle* adopted three of the four prongs of *McKay's* test, rejecting *McKay's* first requirement that the plaintiff must be otherwise precluded from suing the government under the Feres doctrine because such a requirement would produce "results that are in some respect too broad and in some respects and too narrow." *Boyle* further simplified *McKay's* second requirement to require that the United States have "approved" rather "established, or approved" reasonably precise specifications for the military equipment alleged to be defective. *Boyle* 108 S.Ct. at 2517, 2518. The Fifth Circuit formulation of the government contractor defense patterned on *McKay,* set forth in *Bynum* and applied by [*5] the district court in this case, is therefore materially the same as the standard now definitively established by the Supreme Court in *Boyle.*

III

"Summary judgment is proper when, viewed in the light most favorable to the non-moving party, 'the pleadings depositions, answers to interrogatories, and admissions on the file, together with the affdiavits, if any, show that there is no genuine issue as to any material fact.' " *Bynum v. F.M.C. Corp.,* 770 F.2d 556, 576 (5th Cir.1985); Fed.R.Civ.P. 56(c). Should

the moving party carry its burden of showing the absence of a genuine issue of material fact, the burden shifts to the party opposing the motion to demonstrate through affidavits or other competent evidence that a genuine issue of material fact exists for trial. *Bynum*, 770 F.2d at 576. "Mere allegations or affidavits setting forth ultimate or conclusory facts and conclusions of law are not enough." *Id.*: Fed. R.Civ.P. 56(e).

On appeal, Smith contends that Xerox failed to satisfy its burden of proving the affirmative defense of government contractor immunity. First, Smith argues, Xerox failed to establish affirmatively that the government had approved reasonably precise [*6] specifications for the VIPER because the original specifications were never produced; Xerox only produced a set of modified specifications dated February 1985, over a year after Smith's accident. Second, Xerox supplied no evidence that the particular VIPER unit in question had been examined for defects, other than the general statement of a Xerox witness that Xerox produced all its weapons in accordance with specifications. Smith also argues that Xerox had reason to know that the VIPER might misfire in damp conditions and yet failed to inform the government of this possibility, which now precludes Xerox from taking advantage of the government contractor defense.

A.

First we consider whether Xerox sufficiently demonstrated that the government approved reasonably precise specifications for the VIPER simulator. Because *Boyle* itself gives little guidance on what consitutes "reasonably precise" specifications, it is instructive to consult pre-*Boyle* cases construing the same language.

In *McKay*, the Ninth Circuit remanded to the district court

for a determination of whether the United States had set or approved reasonably detailed specifications for an aircraft ejection system [*7] in the face of contradictory allegations by the appellants and appellees. The court of appeals was unable from the record before it to make that determination itself with assurance, but said that "if the United States neither set specifications for the system (other than general outlines of what type of system it required) nor approved [the contractor's] final reasonably detailed specifications (by examining and agreeing to a detailed description of the workings of the system)" then the contractor would be subject to strict liability for the design defect. 704 F.2d at 453.

In the Fourth Circuit's *Boyle* opinion, 792 F.2d 413 (4th Cir.1986), vacated and remanded _____ U.S. _____, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), the court found that a contractor had adequately demonstrated that the Navy had approved reasonably precise specifications where Sikorsky, the helicopter manufacturer, and the Navy worked together to prepare detailed specifications; one of Sikorsky's program engineering managers for the helicopter "described in some detail the back and forth discussions" between Sikorsky and the Navy; Sikorsky built a mock-up of the helicopter cockpit, including the collective [*8] stick and the emergency escape hatch; and the Navy reviewed the mock-up and approved the design. 792 F.2d at 414-15.

Smith complains that Xerox failed to produce reasonably precise specifications for the VIPER's waterproofing procedures. He argues that because they were not produced, this court cannot determine if such procedures were in fact reasonably precise; approved, or ever followed.

Although Xerox failed to produce complete specifications

for the original VIPERS it manufactured, Xerox did produce a listing of those specifications, as well as a copy of the original government performance criteria dictating the environmental specifications the government wanted the VIPER to meet in terms of temperature, humidity, salt resistance, and a production contract furnished by Xerox for a series of VIPERS containing specific reference to government-approved specifications. Further, Lawrence Gallagher, an employee of Xerox from approximately 1975 to 1983 who was involved with the development of the VIPER system, testified at his deposition that the Army reviewed and approved the drawings and specifications prepared by Xerox. The government contractor defense requires only that the government [*9] approve reasonably precise specifications. Because the government in this case supplied the relevant environmental specifications it wanted the VIPER to meet, which were incorporated into Xerox's production contract, and Gallagher's unrebutted deposition testimony was that the government reviewed and approved Xerox's final drawings and specifications for the VIPER, we find that Xerox has satisfied its burden of proof on this issue.

B.

There was also sufficient evidence in the record from which the district court could find that Xerox had satisfied its burden of proof on the second element of the government contractor defense, that the VIPER conformed to its specifications.

In the Fourth Circuit's decision in *Boyle,* on the question whether the helicopter at issue had conformed to its specifications, the Fourth Circuit noted that after Sikorsky built the helicopter, the Navy accepted it as fully complying with specifications and had had thirteen years of experience with it by the time of Boyle's crash. The court held that Sikorsky had

satisfied that requirement of the military contractor defense. 792 F.2d at 414-15. In this case, Gallagher testified for Xerox at his deposition [*10] that inspectors were present on the assembly line. He also testified that every single device produced was given a functional test. Gallagher testified that if the VIPER had not passed inspection, it would not be in use, and from what he knew, the VIPER had worked without problems for years.

The plaintiff in this case was simply unable to adduce any evidence to show that this VIPER was not made in accordance with its specifications. Although the VIPER misfired again when a colonel tested it in the field immediately after it injured Smith, it was taken that same afternoon directly to the Loral maintenance shop where Loral technicians conducted various tests but were unable to duplicate the problem. The VIPER was then sent to factory engineers in California for further testing and was returned to Loral with instructions to reassemble. The VIPER was reassembled and returned to service on May 7, 1984. In the absence of any evidence adduced by Smith tending to show that the VIPER had a manufacturing defect, and in the light of the government's acceptance and extended use of the VIPER and Gallagher's testimony that all units were inspected and tested, we find that the district court properly [*11] granted summary judgment in favor of Xerox on the second prong of the *Boyle* test.

C.

Smith argues that Xerox had notice that the VIPER might misfire under humid conditions because it had modified another system, the CHAPPARAL, to prevent similar misfirings. Because Xerox failed to convey this information to the government, it may not rely on the government contractor defense to

escape liability for accidents resulting from the VIPER's defective design.

We agree with the district court that the VIPER differed significantly from the CHAPPARAL and therefore knowledge that the VIPER might be susceptible to a misfiring from moisture could not be imputed to Xerox from problems Xerox had had with the CHAPPARAL. The CHAPPARAL was always intended to be stored outside, but was originally designed in such a fashion that it literally filled with water when it rained. When Xerox learned of a misfire of the CHAPPARAL associated with rain collection in the CHAPPARAL housing, it redesigned the system, putting in drain holes to prevent water from collecting, and altering the CHAPPARAL's printed circuit board so that a more powerful charge would be required to make the device fire and the system [*12] would be less susceptible to low current short circuits. In contrast to the CHAPPARAL system, the VIPER was never intended to be stored outside where it would be directly exposed to the elements. The VIPER's firing mechanism is located inside a tube, and VIPERs are stored in transit cases when not in use to protect them from contact with rain, snow and mud.

Smith also argues that Xerox has experienced other moisture-related problems with the VIPER system. The record shows from the deposition testimony of Steven Walker, an eyewitness to Smith's accident, that immediately after Smith's accident a colonel tested the weapon in the field and the VIPER misfired again. This incident, however, has no bearing on Xerox's actual knowledge of the VIPER's defective condition prior to Smith's accident. Although there was considerable hearsay evidence of similar accidents occurring in other units, these incidents were never verified. Gallagher testified that Smith's accident was the first he had heard of the VIPER

system's firing when in the armed position. Even if similar accidents had occurred, because the government must receive accident reports it is difficult to see how it can be said from [*13] such incidents that Xerox at any time had information about dangers in the use of the equipment known to the supplier, but not known to the United States. Smith's own witness from Loral testified that at the time the VIPER was produced, there would have been no reason to know of any danger in using the VIPER in high moisture conditions that would have warranted additional weatherproofing beyond that required to meet the environmental specifications provided by the government, because there was then no reason to know that corrosion might cause the VIPER to fire when the pull-to-arm switch was activated.

For these reasons Smith has failed to raise a genuine issue of material fact on this element of Xerox's affirmative defense of government conractor immunity.

IV

Smith concedes, in his supplemental brief filed after the Supreme Court opinion in *Boyle* was rendered, that his state law breach of warranty claim cannot stand after *Boyle*.

V

Smith also appeals the district court's determination that Smith would not be entitled to assert the doctrine of res ipsa loquitur if the case were to proceed to trial.

Although it is true that the applicability of the res ipsa loquitur [*14] doctrine must generally be determined after evidence has been heard at trial, *Sabella v. Baton Rouge General Hospital,* 408 So.2d 382, 383 (La.App.1981), in order

for the res ipsa loquitur rule of circumstantial evidence to apply, (1) the circumstances surrounding the accident must create a presumption of negligence on the part of the defendant; (2) control and management of the instrumentality which caused the accident must have been vested exclusively in the defendant; and (3) the plaintiff's position must be such that he is unable to obtain information regarding the cause of the accident. *Campbell v. Otis Elevator Co.*, 808 F.2d 429, 432 (5th Cir.1987). The district court found that Smith would not be entitled to invoke the doctrine of res ipsa loquitur because Smith could not prove that Xerox and Loral jointly, or one or the other of them individually, had been in exclusive control of the VIPER. Xerox manufactured the VIPER, the Army subsequently exercised control over the weapon, and it came into the custody of Loral only for repairs.

Smith cites *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422, 430 (5th Cir.1977), for the proposition that the doctrine of res [*15] ipsa loquitur does not require him to exclude all possible alternative causes of his injury, but only requires that he establish by a preponderance of the evidence that the negligence of Xerox and/or Loral as opposed to the negligent acts of other parties was the probable cause of his accident. Smith argues that res ipsa should not be rejected as a means of proving Xerox's negligence simply because it is possible that the Army's negligence may have factored into the accident. *See Higginbotham* at 430. We disagree.

In *Higginbotham,* this circuit stated that "[e]very possible alternative cause of the injury need not be totally excluded for res ipsa to apply; all that is necessary is that the likelihood of other causes be sufficiently reduced so that the factfinder may reasonably conclude from a preponderance of the evidence that the fault, if any, is attributable to the party against whom the

doctrine is employed." *Id.* However, res ipsa loquitur cannot be applied to a group of defendants unless that group includes all whose fault might have caused the injury, *Winans v. Rockwell International Corp.*, 705 F.2d 1449, 1455 (5th Cir.1983). Were not the government immune [*16] from liability under the Feres-Stencel doctrine, the Army would be charged as a defendant in this case. *See Feres v. United States,* 340 U.S. 135, 146, 71 S.Ct. 153, 159, 95 L.Ed. 152 (1950) (holding that the United States retains sovereign immunity for personal injuries incurred by servicemen in the course of service); *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 673, 97 S.Ct. 2054, 2058, 52 L.Ed.2d 665 (1977) (holding the government immune from indemnity claims by manufacturers for obligations arising from servicemen's injuries). Because Smith bears the burden of proving "freedom of fault on the part of all through whose hands the instrumentality passed after it left the defendant," *Winans*, 705 F.2d 1455, and the possibility has not been excluded that the Army's own negligent care of the weapon contributed to Smith's acident, res ipsa loquitur cannot apply to a claim against Xerox and Loral as joint defendants. The VIPER passed from Xerox to the Army to Loral, and Smith could not prove that the Army was not negligent; therefore Xerox and Loral cannot be held as joint tort-feasors under the rule of res ipsa loquitur. *See Winans*, 705 F.2d at [*17] 1455.

Nor could a reasonable jury find, from the record evidence, that it was more probable than not that Smith's injury resulted from Xerox's negligence alone under the res ipsa loquitur doctrine. The particular VIPER at issue had been in service for a number of years after its design and manufacture by Xerox, without prior mishap.

Finally, res ipsa loquitur is not applicable in Louisiana unless the likelihood of fault by the injured party is negated.

Because it is uncontested that Smith was improperly positioned when he switched the "arming lever" into the armed position, Smith cannot show that his own error did not contribute to his injury from the VIPER back blast. *Winans*, 705 F.2d at 1455. The district court's determination that Smith could not invoke the doctrine of res ipsa loquitur were the case to go to trial was therefore proper.

VI

For the foregoing reasons, the decision of the district court granting Xerox summary judgment on all claims is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 84-C-1029-B

KEITH E. ELLIS and LINDA ELLIS,
Plaintiffs,

v.

CONSOLIDATED DIESEL ELECTRIC CORPORATION, et al.,
Defendants.

No. 85-C-302-B

DENNIS HODNETT and SONDRA W. HODNETT,
Plaintiffs,

v.

CONSOLIDATED DIESEL ELECTRIC CORPORATION, et al.,
Defendants.

No. 85-C-303-B

(Consolidated under No. 84-C-1029-B)

THOMAS L. CURRY,
Plaintiff,

v.

CONSOLIDATED DIESEL ELECTRIC CORPORATION, et al.,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
HAD ON JANUARY 3, 1986
PLAINTIFFS' RESPONSE TO MOTIONS FOR
SUMMARY JUDGMENT

BEFORE THE HONORABLE THOMAS R. BRETT, JUDGE

Beebe Caslavka
UNITED STATES COURT REPORTER

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PROCEEDINGS

January 3, 1986

MR. LAIZURE: That's true, Your Honor.

THE COURT: All right. Go ahead.

MR. LAIZURE: And—well, getting back to the *Shaw* case, the other reason, the other standard, of course, or the other element is that a warning be given. As we have discussed, there has never been any warning about the risk of the battery being on top of the fuel tank. There is no document in anybody's file anywhere that says there was ever a warning was given to the military and that they made an informed decision to go ahead with the Gama Goat as it was built, knowing that it would pose an unreasonable risk or danger to the occupants of the vehicle.

THE COURT: Any evidence in the record that either of the defendants knew that there was a danger?

MR. LAIZURE: The evidence in the record is that using good design practice and custom of the industry, that they should have known.

THE COURT: Who does that come from?

MR. LAIZURE: That comes from our experts, Your Honor.

THE COURT: That comes from Lehman/Johnson?

MR. LAIZURE: Yes. Even without that, Your Honor, their evidence is a bald statement: We didn't know anything about it. And I don't know—of course, this is up to the Court to rule on this, but my contention is those are conclusory allegations made without any factual foundation or basis because they don't talk about how they came to conclude that they didn't know about it or what was done to see if there were any safety problems by LTV or Condec. They said, "We don't know of anything and we washed our hands of it." And that's—I don't

know, I feel that that is not competent evidence. I don't think that is an allegation of fact. I think that is a conclusion made by LTV and Condec without any underlying factual support. But in any event, there is a definite difference of opinion on whether or not they should have known about that. Our affidavits—

THE COURT: Do you agree that the record is silent as to any other fires to any of these vehicles over the period of time before this one?

MR. LAIZURE: Well, yes, Your Honor. Of course, we only have access to what documents they provide us. And this Mr. Ritch that Mr. Wood referred to, as I read his affidavit, only was involved in the examination and repair and refurbishing of vehicles from 1981 to 1984. We don't have any records on what happened between 1968, the time the first one rolled off the assembly line, to 1980.

THE COURT: Isn't the government a source for that type of information and their analysis of these vehicles?

MR. LAIZURE: We have requested information from the Army on that, Your Honor, and the response that we have gotten has been somewhat incomplete. They have sent us a computer printout of some accidents involving Gama Goats but it has only been a handful of such accidents. None of them—there are a few of those that talk about fires but none that took place in the context of this fire. But the Army has been—and I think counsel for defendant will agree—that the Army has not been the most cooperative of people for either side in this case in trying to get information from them. Be that as it may.

THE COURT: I take it then whatever evidence is—whatever the evidence in the record is, there is only evidence of one fire.

MR. LAIZURE: Yes, Your Honor, that's true, that's true.

I want to talk a little—let me get back to the separation of powers and Mr. Wood's statement about the headnote in the *Shaw v. Grumman* case. And this agrument I think applies no matter what test you apply in this case.

He said that, well, since they say that the manufacturer is only liable for manufacturing defects and didn't participate in the design, it shouldn't be held liable. Well, that skirts the issue because the underlying principle in the *Shaw* case is separation of powers, and if there is no basis for holding LTV absolved or imune from liability, then there is no separation of powers question involved, and all those . . .

* * *

MR. WOOD: Thank you, Your Honor.

MR. NEARY: Will you want to hear from us before the ruling because I really don't know what you're talking about.

THE CLERK: You'll need to see the order.

MR. NEARY: Thank you, Your Honor.

THE COURT: Yes, sir.

(Proceedings closed.)

A TRUE AND CORRECT TRANSCRIPT

Certified:_____

Beebe Caslavka
United States Court Reporter